STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 22, 2005
v	No. 255873 Jackson Circuit Court
ALANZO CALES SEALS, Defendant-Appellant.	LC No. 04-002074-FC

Before: Sawyer, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

After a jury trial, defendant was found guilty of armed robbery of Allyn Goodlock, MCL 750.529, and assault with intent to rob Susan Mayes while armed (AWIRWA), MCL 750.89. Related to those convictions, defendant was also found guilty of two counts of possessing a firearm while committing a felony (felony-firearm), MCL 750.227b. Prior to trial, at the suggestion of the trial judge, defendant also stipulated to the fact that he had a prior felony conviction and was not legally entitled to possess a firearm, agreeing that if the jury convicted him of armed robbery, he would automatically be guilty of being a felon in possession of a weapon, MCL 750.224f, and, related to that, a third count of felony-firearm, MCL 750.227b. The judgment of sentence indicates that defendant was sentenced for these two counts after a "finding by the court," rather than after convictions.

The trial court sentenced defendant as a second habitual offender, MCL 769.10, to concurrent terms of 260 months to 780 months' imprisonment for the convictions for armed robbery and AWIRWA, and two to five years' imprisonment for the felon in possession of a firearm "finding." Defendant was also sentenced to two years' imprisonment on the felony-firearm convictions relating to the armed robbery and AWIRWA, as well as for the felony-firearm "finding" relating to the felon in possession of a firearm charge. The felony-firearm sentences were to be served consecutively to the other sentences but concurrently with each other. Defendant now appeals by right. We affirm defendant's convictions for armed robbery and assault with intent to rob, and the two felony-firearm convictions related to those counts. We, however, vacate defendant's "convictions" on the felon in possession of a firearm and felony-firearm counts that were not submitted to the jury, and we remand for a new trial on those counts.

This case arises out of the armed robbery of Allyn Goodlock on December 20, 2003. Goodlock was sitting in a truck with his date, Susan Mayes, in a Bob Evans parking lot when the

driver's side door "popped open" and two assailants demanded Goodlock's money, cell phone, and truck keys, which Goodlock gave them. One of the assailants had a gun that he pressed against Goodlock's chest. The gunman never pointed the gun directly at Mayes, and neither of the assailants demanded anything from her, other than to tell her to "put [her] hands up." Both Goodlock and Mayes identified defendant as the gunman.

Defendant first argues that there was insufficient evidence to convict him of the crime of assault with intent to rob with respect to Mayes. We disagree.

Defendant has mischaracterized his argument as a sufficiency question. He is, in reality, asking the legal question of whether a conviction for AWIRWA requires the specific intent to rob the person assaulted. Issues of statutory construction are reviewed de novo. *People v Wolfe*, 251 Mich App 239, 242; 651 NW2d 72 (2002) (citations omitted).

In *People v Harris*, 110 Mich App 636, 640; 313 NW2d 334 (1981), the four defendants entered a bank; two were carrying weapons. A security guard fired at one of the defendants and that defendant aimed his gun at the guard. *Id.* at 640-641. Another defendant shot at the guard. *Id.* On appeal, the defendants argued that the crime of assault with intent to rob required the prosecution to prove that they intended to rob the guard. *Id.* at 643. This Court rejected that argument and stated the following:

> The statute in question does not specify that "the intent to rob" be directed at the person assaulted. A more reasonable interpretation would be that the assault be committed as a means to further the intended robbery, be it of the assaulted person or another. . . . The assaults were not gratuitous or committed on whim but rather to perpetuate the robbery. We interpret such an assault to fall within the statutory language. [*Id.* at 643-644.]

In the present case, although there is no evidence that defendant intended to take anything from Mayes, he told her to put her hands up and reasonably put her in fear for her life. On cross-examination, Mayes testified that she "was scared to death to go near [defendant], after what [she had] been through." Defendant's assault on Mayes prevented her from aiding Goodlock herself, or from running away to seek help from authorities, thus furthering the intended robbery of Goodlock. Based on this Court's holding in *Harris*, defendant's argument is without merit.

Next, defendant argues that the trial court erred by failing to instruct the jury that the crime of AWIRWA requires the specific intent to rob Mayes and not just an intent to rob. We disagree.

Defendant has waived his right to appeal the jury instructions. After instructing the jury, the trial court stated, "with regards to the instructions of the Court, any objections, deletions, etcetera?" To which defense counsel responded, "If your honor please, none of the Court's instructions." Similarly, in *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2003), the trial court asked if there were any objects to the jury instructions and defense counsel responded, "No, your honor." This Court determined that the defendant had, therefore, expressly approved the instructions and waived his right to appeal. *Id.*, citing *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Like the defendant in *Lueth*, defendant in the present case expressed acceptance of the instructions, thereby waiving his right to appeal this issue. In any event,

defendant's challenge of the jury instruction on the charge of AWIRWA is without merit because, as we stated previously, the statute does not require the specific intent to rob the person assaulted.

Finally, defendant argues that his stipulation not to send to the jury the charge of felon in possession of a firearm, MCL 750.224f, and felony-firearm, MCL 750.227b, and to allow an automatic conviction on those counts if he was found guilty of the armed robbery, was analogous to a waiver of a jury trial and pleading guilty, and so the court erred by not adhering to the procedural requirements for jury waivers and guilty pleas. We agree.

At an April 2, 2004, hearing,[1] defendant stipulated to the fact that he was a felon at the time the robbery occurred, thereby eliminating the need for the prosecution to present evidence

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[1] The following is an excerpt from the hearing:

THE COURT: This is the matter of People v. Alanzo Cales Seals, S-E-A-L-S; 04-2074. Kathleen Rezmierski is here on behalf of the People, Paul R. Adams is here on behalf of the Defendant

MR. ADAMS: If Your Honor please, thank you very much for taking the matter this afternoon.

Mr. Seals – there was a question of whether or not we could waive jury trial, and Mr. Seals would like to stay on a jury trial docket.

Is that correct, Mr. Seals?

THE DEFENDANT: Yes.

MR. ADAMS: And – but, however, with regard to the matter of proofs, one of the charges in the case is felon being in possession of a firearm.

We will stipulate – the Defense will stipulate that Mr. Seals has been convicted of a felony. I don't think the jury needs to know what kind of felony, but, when Your Honor instructs, you can – Your Honor could indicate to them that it is stipulated between the parties that he does have a felony. So, that takes care of one of the elements of proof that (inaudible).

THE COURT: What was done in the past is that – I don't know, people are going to – going to want to hear is that it would be stipulated to that, if he were to be found guilty of any of the others, that is was stipulated that he was a – a felon at the time this occurred, and if the jury then proved that he did have a firearm in his possession that that then would be automatic proof so that the whole matter of felon in possession of a firearm would not come to the jury to taint the jury.

MR. ADAMS: And this won't –

(continued…)

(…continued)

Do you under stand what he's saying?

THE DEFENDANT: No.

MR. ADAMS: He's saying they'll take that away from the jury, but we agree that, if the jury says you did and armed robbery with a gun, then we would – then that takes away – then it is automatic that you are a felon in possession of the firearm.

Do you understand?

THE DEFENDANT: (Inaudible) –

MR. ADAMS: If they find you guilty –

THE DEFENDANT: Yeah.

MR. ADAMS: – of doing anything –

THE COURT: See, the idea is that, otherwise, the jury hears that you've got a prior felony conviction. This way, the idea is to have the jury not hear that you've got a prior felony, but, instead, just agree that, if the jury says you did an armed robbery and you had a pistol in you possession, then its agree that you are automatically guilty of being a felon in possession of a firearm.

The jury doesn't consider that. So the jury doesn't hear about it. It's to your advantage.

THE DEFENDANT: Okay.

THE COURT: Prosecutor –

MR. ADAMS: Does that sound like the way we ought to go?

THE DEFENDANT: Yes.

MR. ADAMS: Okay.

Yes, Your Honor.

THE COURT: We've done that before.

MS. REZMIERSKI: Does that mean also – that's certainly fine with me. Does that mean they're also in agreement the he would be guilty of a felony firearm count –

THE COURT: Yeah. He'd be –

MS. REZMIERSKI: – for that charge as well? Because there is –

(continued…)

of that element of the charge of felon in possession of a firearm. Beyond that, however, the procedure by which the trial court allowed defendant to agree that he is "automatically guilty of being a felon in possession of a firearm," and of the corresponding felony-firearm count, is not provided for in any statute or court rule. The trial court failed to follow the procedural requirements of MCR 6.402 and 6.403 for defendant to waive his right to a jury trial and for the court to convict him after a bench trial. The trial court also failed to meet the requirements of MCR 6.302 that would permit the court to accept defendant's stipulation as a guilty plea. In fact, our review of the record reveals that defendant was never convicted of being a felon in possession of a firearm, or of the corresponding felony-firearm charge, at all. Rather, as the judgment of sentence indicates, plaintiff was sentenced for these crimes on the basis of a "finding by the court."

Generally, a party cannot stipulate to something and then raise a claim of error on appeal based on the result; such affirmative conduct constitutes waiver. See *People v Aldrich*, 246 Mich App 101, 111; 631 NW2d 67 (2001). A defendant's entry of a plea of guilty and concomitant waiver of a jury trial, however, cannot correspondingly constitute a waiver of the burden placed on the government to prove its case. See *Patterson v New York,* 432 US 197, 215; 97 S Ct 2319; 53 L Ed 2d 281 (1977), ("[A] State must prove every ingredient of an offense beyond a reasonable doubt and . . . may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense."). Accordingly, the burden of proof is not the defendant's to waive. See *In re Winship,* 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970) (noting the importance "in our free society that every individual going about his ordinary affairs have confidence that the Government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty").

Moreover, unpreserved constitutional error classified as structural error requires automatic reversal. *People v Duncan,* 462 Mich 47, 51; 610 NW2d 551 (2000). "Structural errors are defects that affect the framework of the trial, infect the truth-gathering process, and deprive the trial of constitutional protections without which the trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." *People v Watkins,* 247 Mich App 14, 26; 634 NW2d 370 (2001), aff'd on other grounds 468 Mich 233; 661 NW2d 553 (2003), citing *United States v Pavelko,* 992 F2d 32, 35 (CA 3, 1993).

> The Supreme Court articulated the difference between trial error and structural error in *Arizona v Fulminante,* 499 US 279; 111 S Ct 1246; 113 L Ed 2d 302 (1991). A trial error occurs during the presentation of the case to the jury. It can be quantitatively assessed in the context of other evidence for the purpose of determining whether it was harmless beyond a reasonable doubt. *Id.* at 307-308.

(…continued)

THE COURT: Well did they –

Oh, I see. It would be Count VI.

> A structural error, on the other hand, affects the framework of the trial proceeding. It is more than a mere error in presenting the proofs of guilt. *Id.* at 310. When a structural error occurs, a criminal trial cannot serve as a reliable vehicle for the determination of guilt. No criminal punishment could be fair if structural error existed in the framework of the trial. *Id.* [*People v Bell*, 473 Mich 275, 311; 702 NW2d 128 (2005) (KELLY, J., *dissenting*).]

Although the United States Supreme Court has found structural errors only in a very limited class of cases,[2] the error in the case at bar was structural in as much as defendant was denied his constitutional right to have his guilt determined by a jury of his peers without knowingly and voluntarily waiving that right. The trial court in this case told defendant,

> [T]he idea is to have the jury not hear that you've got a prior felony, but, instead, just agree that, if the jury says that you did an armed robbery and you had a pistol in your possession, then it's agreed that you are automatically guilty of being a felon in possession of a firearm.
>
> The jury doesn't consider that. So the jury doesn't hear about it. It's to your advantage.

If defendant was entering a conditional plea, the trial court failed to follow the procedural safeguards mandated by MCL 6.302, assuring an understanding, voluntary, and accurate plea. If, on the other hand, defendant was waiving his right to a jury trial and allowing the felon in possession of a firearm and felony-firearm charges to be tried by the court, stipulating that he was a felon at the time of the crime, the trial court failed to either advise defendant of his constitutional right to a jury trial and determine that he voluntarily waived that right, or to state its findings of fact and conclusions of law on the record, as required by MCL 6.402 and 6.403. A waiver is "'the intentional relinquishment or abandonment of a known right.'" *Carter, supra* at 215 (citations omitted). We fail to understand how telling defendant that it is to his advantage to stipulate to automatic guilt ensures that his constitutional right to a jury trial was waived knowingly and voluntarily, especially in light of the fact that our Supreme Court has ruled that juries are not required to return consistent verdicts. *People v Lewis*, 415 Mich 443, 448; 330 NW2d 16 (1982); *People v Vaughn*, 409 Mich 463, 464; 295 NW2d 354 (1980). Accordingly, we vacate defendant's "convictions" and sentences for being a felon in possession of a firearm and the corresponding felony-firearm violation, and we remand for a new trial on those counts.

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[2] See *Johnson v US*, 520 US 461, 468-469; 117 S Ct 1544; 137 L Ed 2d 718 (1997), citing *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963) (a total deprivation of the right to counsel); *Sullivan v Louisiana*, 508 US 275; 113 S Ct 2078; 124 L Ed 2d 182 (1993) (erroneous reasonable-doubt instruction to jury); *Vasquez v Hillery*, 474 US 254; 106 S Ct 617; 88 L Ed 2d 598 (1986) (unlawful exclusion of grand jurors of defendant's race); *Waller v Georgia*, 467 US 39; 104 S Ct 2210; 81 L Ed 2d 31 (1984) (the right to a public trial); *McKaskle v Wiggins*, 465 US 168; 104 S Ct 944; 79 L Ed 2d 122 (1984) (the right to self-representation at trial); *Tumey v Ohio*, 273 US 510; 47 S Ct 437; 71 L Ed 749 (1927) (lack of an impartial trial judge).

Defendant also notes in his brief on appeal that vacating these counts would affect the calculation of the sentencing guidelines and the sentences imposed for the other convictions. Defendant argues that this Court should, therefore, remand for resentencing on the counts of armed robbery and AWIRWA. Defendant, however, failed to formally brief this issue or state which sentencing variables were affected or by how many points. "Failure to brief a question on appeal is tantamount to abandoning it." *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001). "'An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claim nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority.'" *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004), quoting *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001) (alteration by *Matuszak*). We, therefore, decline to address this issue.

We affirm defendant's convictions and sentences with regard to armed robbery, AWIRWA, and the two corresponding counts of felony-firearm. We vacate defendant's "convictions" and sentences for being a felon in possession of a firearm and the corresponding felony-firearm, and we remand for a new trial on those counts. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Michael J. Talbot
/s/ Stephen L. Borrello